

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Communications between Applicants in	)	WT Docket No. 97-82
Commission Spectrum Auctions	)	
	)	

**Comments of the Office of Advocacy, U.S. Small Business Administration**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”)<sup>1</sup> respectfully submits these Comments in the above-captioned proceeding,<sup>2</sup> in which the Federal Communications Commission (“Commission”) proposes to amend its rules regarding collusion among spectrum auction participants. The current rule prohibits auction applicants from discussing the substance of their bids or bidding strategies.<sup>3</sup> The proposed rule would impose the additional requirement that applicants promptly report any communication that violates the Commission’s collusion rule. The amended rule would apply to communications an applicant makes or receives regarding any applicant’s bid or bidding strategy. The Commission certifies that the proposed rule would have no significant impact on small business, thereby relieving the agency of the requirement to prepare an initial regulatory flexibility analysis. But the Commission does not disclose the factual basis for its certification, as required by the Regulatory Flexibility Act (“RFA”).<sup>4</sup>

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<sup>1</sup> Congress established Advocacy in 1976 by Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government. (Codified as amended at 15 U.S.C. §§ 634 a-g, 637.) Advocacy serves as a focal point for concerns regarding the government’s policies as they affect small business, develops proposals for changes in Federal agencies’ policies, and communicates these proposals to the agencies. (*See* 15 U.S.C. § 634c(1)-(4).) Advocacy also monitors agency compliance with the RFA and reports this to Congress.

<sup>2</sup> *Communications between Applicants in Commission Spectrum Auctions, Notice of Proposed Rulemaking*, WT Docket No. 97-82, FCC 99-384, 65 Fed. Reg. 6113 (February 8, 2000) (to amend 47 C.F.R. § 1.2105(c)(1)).

<sup>3</sup> *See* 47 C.F.R. § 1.2105(c)(1).

<sup>4</sup> Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 et seq.).

The RFA permits an agency to forego preparing the initial regulatory flexibility analysis required when an agency conducts notice and comment rulemaking, if the agency certifies that the proposed rule “will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>5</sup> But this decision is subject to judicial review,<sup>6</sup> and the agency must include “a statement providing the factual basis” for its certification.<sup>7</sup>

The agency’s statement of factual basis should give sufficient reason to permit a court to review it.<sup>8</sup> At a minimum, this factual statement should describe the entities affected by the proposed rule and should describe the impact the rule would have on these entities. This would permit a reviewing court to understand why the agency concludes that the impact of a proposed rule on small business would not be significant.

But in this case, the Commission gives no factual basis at all for its conclusion that the amended rule would not have a significant impact on a substantial number of small businesses. The Commission merely states its conclusion that the amendment “will not have a significant impact on small business.”<sup>9</sup> The Commission does not describe which entities the proposed rule would affect. And the Commission does not explain why its expanded obligations would not impose a significant burden on these entities.<sup>10</sup>

Presumably, the rule would affect any entity participating in a Commission auction. And historically, many small businesses have participated in Commission spectrum auctions. But the Commission gives no indication how many small businesses the new rule would affect.

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<sup>5</sup> 5 U.S.C. § 605(b).

<sup>6</sup> See Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601, et seq. (1996)).

<sup>7</sup> 5 U.S.C. § 605(b).

<sup>8</sup> See 142 CONG. REC. E574, April 19, 1996.

<sup>9</sup> 65 Fed. Reg. 6113, 6114 (2000).

<sup>10</sup> The Commission provides an abbreviated outline of its new paperwork burden. (This identifies annual costs and burdens per 25 respondents: \$40,000 and 200 hours.) But these notations do not explain how the proposed rules will affect small entities, and therefore do not support the Commission’s RFA certification.

The Commission also does not indicate what impact the proposed rule would have on small auction participants. Yet the proposed rule expands the obligations that applicants would face during an auction. For the first time, the collusion rule would explicitly impose reporting requirements on applicants. The collusion rule also would include communications regarding any applicant's bidding and would cover communications received, as well as initiated, by an applicant. But the Commission does not discuss why these expanded obligations impose no significant burden on applicants.

In addition, by expanding applicants' obligations, the Commission would expand the risk of punitive action, which currently can be quite stiff and can include sizable monetary forfeitures.<sup>11</sup> This is a serious concern for small businesses, because small businesses generally have far fewer financial resources than their larger counterparts do. By expanding the reach of the collusion rule, the Commission would expand the risk of punishment. This expansion may have a significant impact on small business, but the Commission fails to explore this issue or explain why the Commission concluded that no significant impact would result.

Also, the Commission does not indicate how much communication has occurred in past auctions regarding applicants' bids and bidding strategy. This information would be helpful in forming a judgment whether the amended rule would have a significant impact. But if the Commission is uncertain how large this problem has been, it should consider requesting comment from past auction participants regarding whether and to what extent they may have made or received communications that would have run afoul of the proposed amended rule.

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<sup>11</sup> See, e.g., *U.S. West Communications, Inc.*, FCC 99-90, released May 7, 1999 (implementing a consent decree whereby U.S. West would pay \$800,000 for violations of the collusion rule, having previously been assessed a penalty of \$1,200,000), *Western PCS BTA I Corporation*, File No. 820EF0012, released March 16, 1998 (imposing a forfeiture of \$200,000 for violations of the collusion rule), and *Mercury PCS II LLC*, FCC 97-388, released October 28, 1997 (imposing a forfeiture of \$650,000 for violations of the collusion rule).

The Commission offers no factual basis for its conclusion that the proposed rule would not be burdensome to small business. Thus, the Commission should publish a supplementing statement outlining the factual basis for its certification that the rule would not impose a significant economic impact on a substantial number of small businesses, as the RFA requires. Should the Commission find it cannot articulate a factual basis for its certification, the Commission must conduct an initial regulatory flexibility analysis to explore what impact its proposed rule would have on small business.

Respectfully submitted,

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March 28, 2000